Filed 9/13/06 Melissa S. v. Sup. Ct. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MELISSA S., Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Real Party in Interest.	E040635 (Super.Ct.No. RIJ107783) OPINION

ORIGINAL PROCEEDING; petition for writ of mandate. Becky Dugan, Judge. Petition denied.

Michelle L. Morris for Petitioner.

No appearance by Respondent.

Joe S. Rank, County Counsel, and Cynthia Morton, Deputy County Counsel, for Real Party in Interest.

The minor, Elijah A., came to the attention of protective authorities in April 2004 when he was eight months old. At the time, his immediate and family situations were as follows.

Elijah was living with his mother, petitioner Melissa S. (mother). On April 8, 2004, a referral was made to the effect that he had a dirty diaper with dried fecal matter and urine.[1] A few days later an "immediate response" referral was received describing ongoing domestic violence between mother and Willie A., the minor's father (father). Mother had recently filed for a restraining order against father. Mother was currently involved with "Irvin," who had recently been released from jail or prison, and was trying to "dump" Father.[2] Relatives and a shelter manager confirmed that mother was "playing the situation" between the two men. Mother was residing with Elijah at a residential drug treatment program, but stated that she was doing so only to get shelter. Her previous residence was another shelter.

Mother had been married three times and intended to divorce her third husband. All three husbands were abusive, physically and/or sexually. She had three other children, two of whom were reported as living with their father in Colorado and one

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[1] This referral was made by father, who later complained to the social worker about the incident.

[2] Father eventually dropped out of the picture and was last reported living in a park and using crack cocaine. He will play no further part in this opinion.

with whom she had failed to reunify and who had been adopted out.[3] Mother reported that the children had been removed from her because she had failed to protect them from cohabitant abuse. Although mother was not the perpetrator, she told authorities that the children "deserved" being beaten with a belt because they were "out of control." Mother also later reported a history of childhood physical and sexual abuse and also told the social worker that she had inadvertently married her biological father, the father of her two older children. She had been diagnosed with post-traumatic stress disorder and depression in the past, but felt that she was managing well at the time.

On the positive side, Elijah appeared healthy and had received regular medical care. Mother expressed willingness to cooperate with the Department of Public Social Services (Department) and said that she was presently looking for employment and had been attending counseling through the "GAIN" program. The Department recommended that the court take jurisdiction over Elijah but that he remain placed with mother. The recommendation was followed.

At the time of the first six-month review report, mother was in compliance with her service plan although she had not been able to find independent housing that she could afford on the $540 monthly benefits she received. The social worker reported that she was "working very hard in all her programs and she is showing progress . . . working on her past issues of abuse in her life and . . . how her past history of abuse impacts on her current functioning and on the lives of her children." Services were continued.

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[3] Mother said that she chose not to contest the matter so that she could concentrate

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Several months later, in July 2005, the social worker recommended that the dependency be terminated. Mother was residing at a new "sober living" program.[4] She had completed a domestic violence program and the "MOM'S Program" along with an aftercare course. She was taking "good care" of Elijah and seeing to any medical needs. Once again, the trial court agreed and terminated the dependency.

In March 2006, however, a "reactivated" petition was filed. It was alleged that mother had recently broken up with "Todd," a schizophrenic who was physically abusive to her and verbally abusive to Elijah. At that point mother had nowhere to go, so she arranged to move in with a disabled acquaintance who needed assistance. Unfortunately, this woman's nine-year-old son, Andrew, was "problematic." An "immediate response" referral brought authorities to the home to investigate a rug burn suffered by Andrew. Mother admitted dragging him across a rug, but explained that he had refused to go to bed and she had no other way to compel him. At the same time, mother told the social worker that Andrew frequently struck Elijah. She promised to keep the two boys apart.

However, at a follow-up visit, mother told the worker that Andrew had recently touched Elijah on the penis. Andrew continued to assault Elijah, and the social worker

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on the pregnancy that resulted in Elijah.

[4] Once again this appears to have been only because it was the only available shelter; real party has never contended that Mother has any current substance abuse issues.

observed the minor crying because the older boy (nine years old) was "bothering" him. Mother indicated that she would move at the end of the month and until then would protect Elijah from Andrew.

Shortly thereafter, a referral was received from a doctor's office to the effect that mother had been heard over the telephone saying to someone else present "You better come and get him before I hurt him." When questioned, mother said that Andrew had been throwing a tantrum and that she was trying to get his mother to exercise authority over him. Two weeks later, a report was made that mother's "former boyfriend" had bitten Andrew's sister, allegedly in play. Mother agreed not to allow the boyfriend in the home or around Elijah. The boyfriend also agreed to this.

Within a very short time additional reports of sexual abuse by Andrew were received and mother admitted that she had observed Elijah sticking his finger in his anus during a diaper change, and that he told her he "learned" it from Andrew. When the social worker made an unannounced visit, mother told her that Andrew had kicked Elijah hard enough to leave a bruise. Although she continued to insist that she could protect the child, he was taken into protective custody. The social worker observed that mother "was not able to maintain a conversation," which she believed might be due to the effects of her mental health medication.[5]

[5] Mother was taking Trazadone, Effexor, and Lamictal. All are, or can be, prescribed for treatment of depression and/or bipolar disorders.

By the time the jurisdictional/dispositional hearing was held on June 7, 2006, mother had moved several times.[6] She had lived at two, or perhaps three, private shelters and with friends. She was not employed, although she was seeking a workers' compensation settlement for an injury allegedly suffered while employed by the disabled woman and was also seeking disability benefits based on her mental condition.

The social worker recommended that services be denied pursuant to Welfare and Institutions Code section 361.5, subdivisions (b)(3) (10) and (11).[7] After re-establishing the dependency, the court made denial findings under the latter two subdivisions and ordered that a hearing be held to determine Elijah's permanent plan pursuant to section 366.26.

This petition is authorized by section 366.26, subdivision (*l*).

DISCUSSION

Mother contends that the trial court's rulings must be reversed because there is insufficient evidence to support the second jurisdictional findings. She specifically asserts that there is a lack of evidence with respect to her "failure to protect" Elijah, the effect of her mental health issues on her ability to parent him, that she failed to benefit from services previously provided to her, and the risk of detriment to the child through domestic violence. She also disputes the order denying her services.

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[6] Apparently she was no longer employed as a caretaker for the disabled woman and her children, and therefore had a limited or no source of funds for living expenses.

[7] All subsequent statutory references are to the Welfare and Institutions Code.

A.

Jurisdictional Findings

Although the Department had the burden in the trial court of proving by a preponderance of the evidence that the minor came within the court's jurisdiction under section 300, on review, we review the evidence in the light most favorable to the findings. If they are supported by substantial evidence, our role ends. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

The trial court found that the minor came within its jurisdiction pursuant to section 300, subdivisions (b), (d) and (g). Mother attacks each facet of each finding, and we address each in turn.

Section 300, subdivision (b) includes the primary "failure to protect" category. Mother insists that the true finding was improper because she had formulated a "safety plan" for Elijah when she realized that Andrew could be physically abusive to the smaller child. The problem with this contention is that although mother did make a plan to keep the children apart, she was unable to put it into effect. At a visit by the social worker on February 2, 2006, *after* the plan was created, mother admitted that Andrew was "relentless" and continued "hitting and punching [Elijah] daily." Some weeks later, mother was still apparently talking vaguely to a friend about "making" a plan and complaining about Andrew's assaults.

Mother points out that she moved from the home after Elijah was removed from her. This is but a variant of shutting the barn door after the horse is gone. If she could not control Andrew, she needed to leave *at once*. At the last visit, Elijah was seen to

have a bruise on his leg from being kicked by Andrew. It is clear that it is only good fortune that prevented the minor from being seriously injured.

Petitioner's reliance on *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036 (*Esmeralda B.*) is misplaced. It is true that the court reversed a "failure to protect" finding for lack of evidence, but that in and of itself does not assist her. In *Esmeralda B.*, the court found that the minor had been molested, but by a person unknown. Upon seeing signs of injury, the parents had immediately taken her to the doctor. They had been cooperative and concerned throughout the investigation. Father had questioned male relatives who might have visited the home during the period in question. Although both parents doubted that the child had been molested—a doubt supported by the child's own consistent, apparently candid denials—all the evidence was that they had provided a safe and loving home for the child and that they had supervised her and the home in a wholly appropriate manner. In the circumstances, the fact that a "mystery molestation" had occurred was found insufficient to prove that the parents were unable to protect the child.

This case is quite different. To begin with, although Elijah had not previously been abused, mother had a long and essentially unbroken history of involvement with physically abusive men, and her other children *had* been physically abused. More immediately, Elijah was not abused or molested by an unknown perpetrator. He was repeatedly assaulted by another child in the household, and mother was very well aware

of the problem. That this situation continued for several weeks while the Department monitored the situation amply establishes her inability to protect her child.[8]

We apply the same analysis to mother's challenge to the finding under section 300, subdivision (d) that she failed to protect the minor from *sexual* abuse. She was aware before she moved in with Andrew's mother that the older child had displayed inappropriate sexual behavior by touching the minor's genital area. Although she later denied having said it, she was reported as having told others that Andrew had licked Elijah's penis and that she had seen him and his sister kissing inappropriately. Nevertheless, the minor continued to suffer sexual abuse by the older boy. The finding was proper.

Mother next contends that there was insufficient evidence of the section 300, subdivision (b) allegation regarding the effect of her mental condition on her ability to care for her child. We agree that the evidence in this respect was not overwhelming. However, during the period when real party was investigating the situation with Andrew, mother was observed to have deteriorated in critical respects. One referral described her as having "dirty clothing, unkempt hair," and poor hygiene. In addition, her speech was very rapid, raising suspicions that she was either using drugs or off her medication. The social worker personally observed at one visit that mother "was not able to maintain a

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[8] We are perhaps more sympathetic than the trial court, which commented that "You know, she puts her rent above her child's safety." It is fairly obvious that the only reason mother remained with Andrew's mother is that she had no good alternatives. If she lost her job, she would lose her home and be thrown once again on the fragile

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conversation," and mother admitted that "she was having trouble adjusting to her medications." After the minor was removed, she also admitted to the social worker that her disorder had recently gone "sky high." The trial court was entitled to draw the inference that the exacerbation of her mental disorders at least affected her judgment concerning the minor and her situation in general. The finding was proper.

Mother then attacks the purported finding[9] that she failed to benefit from the several years of services that she had received. It is true, as she points out, that she was always cooperative and participated as required. As the trial court noted, however, the problem is that other than with respect to her substance abuse, the services in which she has participated have failed to result in a change in her behavior with respect to putting her children at risk. While her ability to provide adequate nurturing and physical care is unquestioned, her inability to appreciate the dangers her relationships with abusers create for her child is also very clear. During the period immediately preceding the latest intervention, she formed a relationship with "Todd," who, as she admitted, physically abused her and verbally abused the minor. Within several weeks after breaking up with "Todd," she had a new boyfriend who bit a child hard enough to leave bruises. Mother

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kindness of strangers. In our view, mother has never exhibited a disregard for the minor's safety; she has simply lacked the personal resources to secure it.

[9] The record does not appear to contain an explicit finding in this respect. However, as both parties address the point, so do we. The same is true for mother's challenge to the "finding" concerning father's domestic violence issues.

has simply never internalized the critical point that such persons are not safe to have around children. Thus, she failed to benefit from services.

Mother also challenges the purported (see fn. 9) finding that father's issues of domestic violence put Elijah at risk. She notes that Father is no longer "in the picture." But that is only a small part of the picture. Father was preceded by three abusive husbands, and succeeded by at least two physically violent boyfriends. The risk is clear.

B.

Dispositional Issues

As the above discussion should make clear, the court did *not* err in assuming jurisdiction over the minor or removing him from mother's care. The remaining issue is whether the court properly denied additional services to mother.[10]

The trial court denied services under section 361.5, subdivisions (b)(10) and (11), both of which relate to parents who have had children previously removed. Both require, before services can be denied, that the parent "has not subsequently made a reasonable effort to treat the problems that led to removal. . . ." The issue here is whether, following the termination of services and/or parental rights with respect to mother's older children,

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[10] Mother relies on *In re Henry V.* (2004) 119 Cal.App.4th 522, in which the court reversed a decision to remove the minor. The court focused on the fact that only a single act of abuse had been visited upon the minor, while the home environment otherwise appeared appropriate and the parents expressed appropriate concern. The court found that it had not been established by "clear and convincing evidence" that services to the minor and his family could not have been provided in the home.

In this case, by contrast, Elijah has lived virtually his entire life at risk of abuse from mother's succession of unreliable mates. His safety simply cannot be assured in mother's custody.

she made "reasonable efforts" to address the problems. Once again we apply the "substantial evidence" standard. (*Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474.)

First, mother argues that it is improper to deny services when a previous dependency has resulted in a successful reunification, citing *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181. But that case involved *only* a previous successful dependency; although mother successfully reunified with Elijah the first time, she has repeated failures with *other* children. Both subdivisions (b)(10) and (11) of section 300 permit denial of services when a parent has failed with respect to a sibling of the subject minor. They do not expressly state that a successful reunification with some child, at some point, deprives the court of the power to apply the subdivisions, and we decline to so read them.[11]

As mother points out, when the Department first stepped in concerning Elijah, she cooperated fully and in fact regained custody of the child. She participated—"worked very hard"—in programs involving domestic abuse issues. However, her efforts, though they may have been sincere, resulted in no change in her lifestyle and no improvement in her personal choices. Section 300, subdivision (b) as a whole was designed to address the recognized fact that although reunification services have a crucial role, and reunification is normally favored, there are circumstances where it would be useless to

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[11] Section 361.5, subdivision (c) gives the court *discretion* to order services to many otherwise ineligible parents if it finds that it is in the best interests of the minor to do so. Thus, a previous failure is not necessarily a bar to services.

provide services. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 467.) Instead, the legislative focus is on providing services to those parents who have a reasonable chance of benefiting from them. (*Id.* at p. 471.)

Given this intent, we believe that "reasonable efforts" must be construed to mean not only participation efforts, but also *results* efforts. In a somewhat analogous situation, a parent may be denied services under section 300, subdivision (b)(13) for "resisting" substance abuse treatment even if the parent has fully participated in an appropriate program; if the parent continues to abuse illicit drugs that constitute de facto "resistance." (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 382-383; *In re Levi U.* (2000) 78 Cal.App.4th 191, 200.) In this case, mother's participation in counseling and domestic violence programs has made no difference in the situations in which she places herself and her child. Although presumably she knows how to change, she is not doing it. In that crucial respect her efforts are clearly insufficient.

Finally, mother argues that the court should have exercised its discretion to order services for her under section 361.5, subdivision (c) by finding that it would be in Elijah's best interests to do so. We cannot agree. Given the limited likelihood of further improvement on mother's behalf, it is not in his best interests to remain in limbo, but to proceed to some kind of permanent resolution of his life.

Disposition

The petition for writ of mandate is denied.

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/s/ Hollenhorst
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.